

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,  
  
Petitioner,  
  
v.  
  
MICROSOFT CORPORATION, et al.,  
  
Respondents.

Case No. C15-00102RSM

UNITED STATES OF AMERICA,  
  
Petitioner,  
  
v.  
  
CRAIG J. MUNDIE, et al.,  
  
Respondents.

Case No. C15-00103RSM

**ORDER GRANTING ENFORCEMENT OF SUMMONS**

**I. INTRODUCTION**

This matter comes before the Court on the United States of America's Petitions to Enforce Internal Revenue Service Summons (Case No. 15-102, Dkt. #1; Case No. 15-103, Dkt. #1), and this Court's Orders to Show Cause why Respondents Microsoft Corporation, *et al.* ("Microsoft") should not be compelled to comply with the summonses served upon them (Case No. 15-102, Dkt. # 23; Case No. 15-103, Dkt. # 24). For the reasons stated herein, the Court

1 finds that Respondents have failed to meet their burden to demonstrate that enforcement of  
2 these summonses would result in an abuse of the Court's process.

## 3 II. BACKGROUND

### 4 A. Procedural Background

5 These summons enforcement proceedings arise out of an investigation by the Internal  
6 Revenue Service ("IRS") into Microsoft's 2004 – 2006 taxable years. Case No. 15-102, Dkt.  
7 #37, ¶ 2. The IRS audit, ongoing since 2007, focuses on two cost-sharing arrangements that  
8 Microsoft entered into with its affiliates in Puerto Rico and Asia during the subject time period.  
9 *Id.* at ¶¶ 3-4; Case No. 15-102, Dkt. #40, ¶ 5. Through October 2014, the IRS examination team  
10 conducted fact gathering by issuing over 200 information documents requests ("IDRs") to  
11 Microsoft and conducting informal interviews with its employees. *Id.* at ¶¶ 26, 27, 71.

14 In furtherance of its investigation, the IRS issued a designated summons to Microsoft on  
15 October 30, 2014, pursuant to 26 U.S.C. §§ 7602 and 6503(j). Case No. 102, Dkt. #37 at ¶ 24;  
16 Dkt. #1, ¶ 7. Beginning December 11, 2014, the IRS filed a series of petitions with this Court to  
17 enforce this and related designated summonses, which this Court consolidated into the two  
18 above-captioned cases. The Court determined that the IRS had made the requisite initial  
19 showing to obtain the Court's enforcement of the summonses and issued Orders to Show Cause  
20 why they should not be enforced. Case No. 15-102, Dkt. # 23; Case No. 15-103, Dkt. #24.  
21 Microsoft filed Motions seeking an evidentiary hearing in order to demonstrate that discovery  
22 into the IRS's alleged abuse of process was warranted prior to the Court's final enforcement  
23 determination. Case No. 15-102, Dkt. # 34; Case No. 15-103, Dkt. #35. A single consolidated  
24 hearing was granted and held on August 25, 2015. Case No. 15-102, Dkt. ##56, 82; Case No.  
25 15-103, Dkt. #57. During that hearing, only a single witness was called by Microsoft—IRS  
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1 employee Eli Hoory. After hearing Mr. Hoory testify but before the Court could rule on  
 2 whether to grant discovery in these matters, Microsoft filed a notice withdrawing its request for  
 3 additional discovery.<sup>1</sup> See Case No. 15-102, Dkt. #86. The parties then filed briefing on the  
 4 ultimate issue of enforcement of these summons. See Case No. 15-102, Dkt. ##93, 97, 100.<sup>2</sup>  
 5 Oral argument was held on November 6, 2015. Case No. 15-102, Dkt. #103.

### 6 **B. Factual Background<sup>3</sup>**

7  
 8 During the IRS audit investigation at issue, Microsoft agreed to several extensions of the  
 9 statute of limitations deadline for the IRS to end its investigation. See Dkt. #93 at 10; Dkt. #96.  
 10 In November 2013, the IRS requested that Microsoft extend the statute of limitations from June  
 11 30, 2014, to December 31, 2014. Dkt. #96 at ¶ 13. Microsoft consented to this extension on  
 12 February 28, 2014. *Id.* at ¶ 19. The IRS also sent Microsoft timelines consistent with the IRS’  
 13 “Roadmap” for transfer pricing audits. Case No. 15-102, Dkt. #94 at ¶¶ 2-5; Dkt. ##94-1, 94-2,  
 14 94-3, 94-4. According to the final audit timeline given to Microsoft, the IRS planned to present  
 15 its “conclusions” to Microsoft in November 2013, engage in “[d]ialogue with Taxpayer on  
 16 Issues,” and, if the parties could not reach agreement, move by April 2014 to “Resolution” or  
 17 “Issuance of 30-Day Letter.” Case No. 15-102, Dkt. #94-4.

#### 18 *Quinn Emanuel Contract*

19  
 20 Microsoft’s arguments against enforcement concern the IRS’s engagement of the law  
 21 firm Quinn Emanuel Urquhart & Sullivan, LLP (“Quinn Emanuel”), as a private contractor to  
 22

23  
 24  
 25 <sup>1</sup> In addition to these matters, Microsoft has sought related documents from the IRS by way of several Freedom of  
 26 Information Act (“FOIA”) requests. A first FOI action filed in the U.S. District Court for the District of Columbia  
 27 was dismissed on stipulation of the parties on November 24, 2014 after the IRS agreed to produce of copy of the  
 28 Quinn Emanuel contract and related documents. See *Microsoft Corp. v. IRS*, Case No. 14-cv-01982-RBW (D.D.C.  
 Nov. 24, 2014). A second FOIA complaint is currently before this Court. See *Microsoft Corp. v. IRS*, No. 2:15-cv-  
 00369-RSM (W.D. Wash.).

<sup>2</sup> The Court will cite to the Parties’ briefing as Dkt. ##93, 97, 100 without reference to the 15-102 case number.

<sup>3</sup> The following factual background will be limited to the facts necessary for the Court to engage in its limited role  
 of enforcing these summonses, consistent with *Clarke*, *infra*.

1 assist in the IRS's examination of Microsoft's 2004 to 2006 tax years. In May of 2014, The IRS  
2 awarded Quinn Emanuel a contract for "Professional Expert Witness" services, agreeing to pay  
3 the firm \$2,185,500 for its work investigating the Americas cost sharing arrangement. Case No.  
4 102, Dkt. #37, ¶ 20; Case No. 102, Dkt. #40, ¶ 78; Case No. 15-102, Dkt. # 36-4 (contract), §§  
5 B.2, C. Microsoft asserts that this contract represented the first time that the IRS had engaged  
6 private civil litigators in a U.S. income tax audit. *Id.* at ¶ 6.

8 Although the contract states that it covers Quinn Emanuel's performance throughout  
9 four non-severable phases, only the first phase is actually detailed therein. *See* Case No. 15-102,  
10 Dkt. #36-4 at 7-8, 22. Among services to be performed in the first phase, Quinn Emanuel is to  
11 "support continued development, analysis, and preparation of the issues under examination" by  
12 "identifying additional information deemed necessary to develop clearly defensible positions,  
13 including any necessary data, documents, or interviews; assisting with further factual  
14 development through document review, identifying and preparing new document requests,  
15 preparing for or participating in interviews[; etc.]." *Id.* at 8.

#### 17 *Temporary Regulation*

19 On June 9, 2014, the Treasury Department and the IRS issued, without notice and  
20 comment, a "temporary regulation" providing for third-party contractors like Quinn Emanuel to  
21 participate in the summons process. *See* 26 C.F.R. § 301.7602-IT(b)(3); Case No. 102, Dkt.  
22 #36, ¶ 7. The regulation "make[s] clear" that third-party contractors "may receive books,  
23 papers, records, or other data summoned by the IRS and take testimony of a person who the IRS  
24 has summoned as a witness to provide testimony under oath." 79 Fed. Reg. 34,625 (June 18,  
25 2014); 26 C.F.R. § 301.7602-IT(b)(3).

### *Role of Quinn Emanuel in Audit*

The IRS attests that, owing to time spent completing procedural and administrative prerequisites, Quinn Emanuel did not begin its performance under the contract until July 15, 2014, over one month after the issuance of the temporary regulation. Case No. 102, Dkt. #40, ¶ 80. Nonetheless, the IRS did not disclose Microsoft’s retention of counsel from Quinn Emanuel until informing Microsoft on August 28, 2014, that “outside counsel from Quinn Emanuel retained to assist” in the examination may be included in scheduled consensual interviews. Case No. 102, Dkt. #37, ¶ 16; Dkt. #37-2. Quinn Emanuel representatives subsequently attended Microsoft employee interviews held by the IRS during the weeks of September 22 and October 6, 2014, with their direct participation limited to asking follow-up questions. *Id.* at ¶ 84.

The IRS concedes that Quinn Emanuel reviewed documents and transcripts of the interviews and completed an independent assessment of the positions taken by the IRS and Microsoft with respect to the Americas cost sharing arrangement. *Id.* at ¶ 85. While the IRS attests that Quinn Emanuel did not prepare initial drafts of any of the summonses at issue here, it further concedes that Quinn Emanuel was given an advanced copy of a designated summons and that its comments were sought. *Id.* at ¶ 86.

## **III. DISCUSSION**

### **A. Legal Standard**

If a taxpayer neglects or refuses to obey a designated summons, the IRS may bring an enforcement action in United States district court. 26 U.S.C. § 7604(b); *see United States v. Clarke*, 134 S.Ct. 2361, 2365 (2014). In order to obtain the court’s enforcement, the IRS must make an initial showing of “good faith” by establishing its compliance with the *Powell* factors: “that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may

1 be relevant to the purpose, that the information sought is not already within the [IRS's]  
2 possession, and that the administrative steps required by the [Internal Revenue] Code have been  
3 followed.” *United States v. Powell*, 379 U.S. 48, 57-58 (1964). The Court has already found  
4 that the IRS made this *prima facie* showing in this case. *See* Case No. 15-102, Dkt. # 23; Case  
5 No. 15-103, Dkt. # 24.

6  
7 Once the IRS makes this initial showing, the burden shifts to the taxpayer to  
8 demonstrate that enforcement of summons would result in an abuse of the court’s process.  
9 *Powell*, 379 U.S. at 58; *see also United States v. Gilleran*, 992 F.2d 232, 233 (9th Cir. 1993).  
10 This adversarial enforcement proceeding exists to protect against abuse of the power vested in  
11 tax collectors. *See Clarke*, 134 S.Ct. at 2367. At the same time, enforcement proceedings are to  
12 be “summary in nature,” and the court must eschew any broader role than determining whether  
13 the IRS issued the contested summons in good faith and without an improper purpose. *Clarke*,  
14 134 S.Ct. at 2367 (quoting *United States v. Stuart*, 489 U.S. 353, 369 (1989)).

15  
16 A taxpayer “may challenge the summons on any appropriate grounds, including failure  
17 to satisfy the Powell requirements or abuse of the court's process.” *United States v. Jose*, 131  
18 F.3d 1325, 1328 (9th Cir. 1997) (citing *Reisman v. Caplin*, 375 U.S. 440, 449, 11 L. Ed. 2d  
19 459, 84 S. Ct. 508 (1964)) (internal quotation marks omitted). “The taxpayer must allege  
20 specific facts and evidence to support his allegations of bad faith or improper purpose.” *Id.*  
21 (citing *Liberty Fin. Servs. v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985)) (internal  
22 quotation marks omitted). Although there is no definitive list of activities that can constitute an  
23 abuse of the court’s process, *Powell* offers the examples of summons issued “to harass the  
24 taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose  
25 reflecting on the good faith of the particular investigation.” 379 U.S. at 58.  
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1           Importantly, “[e]ven the co-existence of an improper purpose would not prevent  
2 enforcement of the summons if the existence of a legitimate purpose was not rebutted by the  
3 taxpayer.” *United States v. Stuckey*, 646 F.2d 1369, 1375 (9th Cir. 1981). The applicability of  
4 this holding is acknowledged by both parties. The Ninth Circuit, citing the Supreme Court, has  
5 stated that “[t]hose opposing enforcement of a summons... bear the burden to disprove the  
6 actual existence of a valid civil tax determination or collection purpose by the Service....  
7 Without a doubt, this burden is a heavy one.” *United States v. Jose*, 131 F.3d 1325, 1328 (9th  
8 Cir. 1997) (citing *United States v. LaSalle Nat’l Bank*, 437 U.S. 298, 316, 57 L. Ed. 2d 221, 98  
9 S. Ct. 2357 (1978)).  
10

11           **B. The IRS’ Evidence of a Legitimate Purpose**  
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13           The IRS argues that these summonses are being issued “to do exactly what Congress  
14 authorized it to do: make an accurate determination of Microsoft’s tax liability.” Dkt. #97 at  
15 18. Or to put it more simply, the IRS has repeatedly argued that the goal of these summonses is  
16 to help the IRS “get to the right number.” *See* Dkt #97 at 9; Dkt. #101 at 54:11; 57:18-20. The  
17 IRS further argues that these summonses are needed “to support those numbers with a record  
18 that will withstand an inevitable cascade of challenges from Microsoft.” Dkt. #97 at 9. These  
19 assertions are not just argument, they are based on citations to evidence, specifically the  
20 testimony of the sole witness brought before the Court in this matter, IRS employee Eli Hoory.  
21 Mr. Hoory testified as follows:  
22

23           Q. Earlier today you were accused of asking for this information in  
24 these summonses to essentially prepare for tax court litigation. Is  
25 that why these summonses were prepared and the information  
26 sought?

27           A. No. We certainly know there is a possibility that this will wind  
28 up in tax court. And, obviously, given the state of the exam, that  
likelihood is obviously higher than it might be in another case.

1           However, the summons is, just like in any examination, they are  
2           supposed to help us get to the right number.

3           ...Let me be clear. This case has not been designated for litigation  
4           yet. We are still seeking information to get to the right number.

5           Dkt. #94-29 (Transcript of August 25, 2015, Evidentiary Hearing) at 192-193.

### 6           **C. Microsoft's Evidence of an Improper Purpose**

7           Microsoft's evidence of the IRS' bad faith or improper purpose can be divided into four  
8           allegations: that the IRS deceived Microsoft into extending the statute of limitations, that  
9           enforcing the summonses would allow Quinn Emanuel contractors to "take testimony" contrary  
10          to 26 U.S.C. §7602, that enforcing the summons would allow Quinn Emanuel to impermissibly  
11          conduct tax examination functions, and that the hiring of Quinn Emanuel shows that the IRS  
12          was or is improperly preparing for tax court rather than conducting an audit.<sup>4</sup> *See* Dkt. #93 at  
13          2-3. The Court will address each in turn.

#### 14          **a. Statute of Limitations Extension**

15          Microsoft argues, in their "Statement of Facts," that "[a]s Microsoft cooperated and  
16          awaited a final determination, the IRS changed to a litigation posture, planning to extend the  
17          audit to allow trial lawyers from Quinn Emanuel to prepare their case for Tax Court." Dkt. #93  
18          at 8. Microsoft argues, "[w]hat Microsoft did not know was that the IRS intended to use the  
19          extension of the limitations period to hire trial counsel from Quinn Emanuel and to use the  
20          agency's broad examination power to begin trial preparation." *Id.* at 9. As evidence for this  
21          22          23          24          25

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26          <sup>4</sup> Microsoft appears to raise an additional allegation in its Reply, arguing that the IRS intends to obtain legal advice  
27          from Quinn Emanuel, and that such legal advice is "contrary to Section 7803(b)'s requirement that legal advice to  
28          the IRS be provided by the Office of Chief Counsel." Dkt. #100 at 19. This issue was not raised in Microsoft's  
initial brief—the closest Microsoft comes to raising this issue is a single sentence at the end of a paragraph,  
"Congress has also explicitly reserved the role of providing legal advice to the IRS Office of Chief Counsel" Dkt.  
#93 at 33 (citing 26 U.S.C. § 7803(b)). The Court finds that this argument was not properly raised in Microsoft's  
initial brief, thus depriving the IRS of the opportunity to properly respond, and it will not be addressed.



1 assertion, Microsoft merely points to the *timing* of the two events: the IRS hired Quinn  
2 Emanuel; the IRS contacted Microsoft to extend the limitations period. *See id.*

3 In Response, the IRS points out that it “had no duty or reason to disclose to Microsoft,  
4 in February 2014, a *potential* contract for legal advice and audit support.” Dkt. # 97 at 22  
5 (emphasis in original). The IRS also argues that “disputes over statutes of limitations fall  
6 outside of the scope of the limited purpose served by summons enforcement proceedings, citing  
7 *United States v. Lask*, 703 F.2d 293, 300 (8th Cir. 1983); *United States v. McHenry*, 552 F.  
8 Supp.2d 571, 574-75 (E.D. Va. 2008).  
9

10 On Reply, Microsoft points to no legal authority requiring the IRS to disclose the hiring  
11 or potential hiring of Quinn Emanuel before seeking an extension of the statute of limitations.  
12 At oral argument, Microsoft reiterated their position that “the summonses were the result of the  
13 IRS asking and obtaining statute of limitations extensions from Microsoft, while they were  
14 hiding the fact that they were engaging Quinn Emanuel.” Dkt. #104 at 36. In the end,  
15 Microsoft frames this issue as one of public policy—that the IRS should be honest with  
16 taxpayers. *Id.* at 36-37. When asked at oral argument if there was “some law, rule or  
17 regulation that would have required the IRS to disclose its plan to use Quinn Emanuel,”  
18 Microsoft responded in the negative. *Id.* at 38. When asked if the IRS “hiding the ball”  
19 constituted “bad faith,” Microsoft again responded in the negative, insisting instead that the  
20 IRS’s actions constituted a lack of candor. *Id.* The Court finds that Microsoft has presented  
21 insufficient facts and legal authority to connect its statute of limitations extension claim to the  
22 kind of improper purpose or bad faith required to prevent the enforcement of these summonses.  
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**b. “Taking Testimony”**

Microsoft argues that these summonses are unenforceable because they will allow the IRS to use Quinn Emanuel contractors to “unlawfully take testimony.” Dkt. #93 at 16. Microsoft argues that the IRS has already admitted in briefing that it plans to have Quinn Emanuel contractors ask questions of the summoned individuals under oath. *Id.* (citing Case No. 15-102, Dkt. #39 at 15 & n.9). Microsoft argues that allowing Quinn Emanuel and other outside contractors to ask questions of summoned individuals under oath “would violate the Internal Revenue Code, which provides that only the Secretary of the Treasury and specified delegates, not outside contractors, can take summoned testimony,” citing 26 U.S.C. §7602. *Id.* Microsoft also argues that the temporary regulation promulgated by the IRS related to this issue is invalid because: “(1) it is inconsistent with the unambiguous text of the Internal Revenue Code; (2) it is not the product of reasoned decisionmaking; and (3) it was unlawfully issued without notice and comment.” *Id.* Microsoft connects the potential violation of §7602 with these summonses by citing to *In re Grand Jury Proceedings*, 450 F.2d 199, 209 (3d. Cir. 1977) for the proposition that, “[i]t seems beyond question that a district court may not compel the violation of an express congressional prohibition.” Dkt. #93 at 16-17; Dkt. #100 at 6.

The Court will first address the §7602 issue, i.e. whether the IRS can delegate the asking of questions to a contractor under this statute. Microsoft argues that this Section authorizes only the “Secretary” to take summoned testimony in support of tax examinations, and that “Secretary” is defined as “the Secretary of the Treasury or his delegate” under §7701(a)(11)(B), and that “delegate” is further defined as “any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority,” citing §7701(a)(12)(A)(i). Dkt. #93 at 17.

1 Microsoft further points to “congressional sensitivity” as to who conducts sworn interviews.  
 2 *See id.* at 18. Microsoft acknowledges that contractors can, in fact, assist in the taking of  
 3 testimony by “suggesting questions for the IRS to ask.” *Id.* at 19 (citing *United States Telecom*  
 4 *Ass’n v. F.C.C.*, 359 F.3d 554, 566 (D.C. Cir. 2004)).

5 In Response, the IRS argues that §7602 does not place limits or restrictions on how the  
 6 Secretary delegates its authority to gather information. The IRS argues that “[t]he power to  
 7 ‘take testimony’ is inherently governmental, but asking questions of a witness (gathering facts)  
 8 is not.... Contrary to Microsoft’s argument, the statute does not require that ‘the Secretary’  
 9 ‘take testimony.’ In fact, the statute does not require or limit the Secretary to do anything. It  
 10 grants him authority.” Dkt. #97 at 26 (emphasis in original). The IRS argues that Congress has  
 11 not dictated procedures to be followed in an interview with IRS lawyers and a contractor, and  
 12 cites to *Euge v. United States*, 444 U.S. 707, 711-12 (1980) for the proposition that: “...if the  
 13 summons authority claimed is necessary for the effective performance of congressionally  
 14 imposed responsibilities to enforce the tax Code, that authority should be upheld absent express  
 15 statutory prohibition or substantial countervailing policies.” Dkt. #97 at 26.

16 At Oral Argument, Microsoft provided the following clarification of their argument:

17 THE COURT: All right. Well, let me ask you this. Looking at that  
 18 section [§7602] right there that you've got, and you've got it on the  
 19 screen, broken down into three separate pieces; right?

20 MS. EAKES: Right.

21 THE COURT: Can a third-party contractor examine any books,  
 22 papers, records, or other data?

23 MS. EAKES: Yes. But they can do that under 6110 -- oh, 6103....

24 THE COURT: Here, can they do the same thing with Quinn  
 25 Emanuel, let them examine books, papers, records, or other data of  
 26 Microsoft?

27 MS. EAKES: They can let them under -- well, if the Court means  
 28 "examine" in terms of conduct the audit, is what we're saying, can  
 they look at the documents as a contractor, under 6103? Yes, as  
 long as, again, they comply with everything under that statute. But

what they can't do is examine, meaning they can't perform the audit themselves. That's what we say they're doing.

THE COURT: Can they suggest questions for the IRS to ask?

MS. EAKES: Yes, they can suggest questions.

THE COURT: Can they be in the same room when that examination is taking place?

MS. EAKES: Yes.

THE COURT: So --

MS. EAKES: They just can't ask the questions.

THE COURT: So if you've got a lawyer for the IRS, right, that's one of the delegates of the Secretary in the room, you've got Quinn Emanuel lawyers reviewing all the data, all the documents, they're listening to the testimony, and they've got a notepad, and they write down the questions, and they hand it over to the IRS lawyer, then it would be fine?

MS. EAKES: Yes. And let me explain why, because you're looking at me skeptically. And I think that the important difference, Your Honor, is that suggesting questions -- the important check there is that you still have the IRS lawyer there who is the person who has to exercise their discretion and judgment as to whether or not to ask that question. And that's the difference between helping and suggesting....

Dkt. #104 at 31-33.

Microsoft thus admits that the Quinn Emanuel is permitted under law to examine Microsoft's books and records, formulate questions to ask witnesses under oath, attend those interviews, and even ask questions via notepad so long as it is the IRS lawyer who speaks the words. However, there is nothing in §7602 that prevents the IRS from taking this a step further and having the contractor ask a question while an IRS lawyer continues to run the interview.

The Court is troubled by Quinn Emanuel's level of involvement in this audit. The idea that the IRS can "farm out" legal assistance to a private law firm is by no means established by prior practice, and this case may lead to further scrutiny by Congress. However, Microsoft has failed to convince the Court that §7602, which empowers the Secretary to take certain actions, actually limits the IRS' ability to delegate the asking of certain questions to contractors like Quinn Emanuel attorneys. Microsoft points to no other legal authority that definitively

1 prevents the IRS from so delegating. The Court finds that Microsoft's §7602 arguments fail to  
2 support its burden of proving that these summonses are in bad faith or for an improper purpose.  
3 Because Microsoft has failed to prove that the IRS lacked this authority under statute, the  
4 validity or invalidity of the temporary regulation is moot and need not be addressed.

5  
6 **c. Quinn Emanuel Conducting Tax Examination Functions**

7 Microsoft argues that the IRS' intended use of Quinn Emanuel would constitute a  
8 contractor engaging an inherently-governmental function. *See* Dkt. #93 at 33-34. The parties  
9 appear to agree that "a contractor cannot perform an inherently governmental function," but  
10 Microsoft goes on to argue that "[t]axation is one such inherently governmental function," and  
11 that the IRS is delegating "the audit function" to Quinn Emanuel, and that "Quinn Emanuel's  
12 role almost completely overlaps the IRS's own designated role." *Id.* at 34.

14 In Response, the IRS argues that its intended use of Quinn Emanuel does not constitute  
15 engaging in an inherently-governmental function, and that Microsoft's narrative is contrary to  
16 the testimony of Mr. Hoory. *See* Dkt. #97 at 23 (citing Dkt. #94-29 at 74-75; 189-191). The  
17 IRS cites to 31 U.S.C. § 501 for the definition of an inherently governmental function as "a  
18 function that is so intimately related to the public interest as to mandate performance by  
19 Government employees," and for the proposition that an inherently governmental function does  
20 not normally include "gathering information for or providing advice, opinions,  
21 recommendations, or ideas to Federal Government officials." *Id.* at 23.

24 The Court finds that Microsoft's characterization of the role of Quinn Emanuel greatly  
25 exceeds what is evident in the record—Microsoft has no factual basis for the grand assertion  
26 that Quinn Emanuel was or will be engaging in taxation or conducting the audit of Microsoft.  
27 Rather, the facts appear to indicate that Quinn Emanuel will be gathering limited information  
28

1 for the IRS under the direct supervision of the IRS. Further, Microsoft cites to no legal  
2 authority indicating that asking questions in an interview is an inherently-governmental  
3 function. The Court finds that Microsoft's limited argument on this subject fails to meet or  
4 support its heavy burden of proving the summonses are in bad faith or for an improper purpose.

5 **d. Preparing for Tax Court**

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7 More so than Microsoft's other arguments, this claim directly attacks the IRS' claim of  
8 a legitimate purpose for these summonses. Microsoft begins by citing *Stuckey, supra* ("where a  
9 summons has a proper purpose along with an improper one, it may still be enforced"),  
10 acknowledges the IRS' position that its audit is incomplete, i.e. it is still trying to get to "the  
11 right number," but argues that "the trajectory of the audit and the timing of the summonses tell  
12 a different story – the IRS was almost done with its audit until Quinn Emanuel came along."  
13 Dkt. #93 at 32. Microsoft argues that "[t]he summonses themselves, therefore, have a solely  
14 improper purpose, which makes them unenforceable." *Id.* Microsoft goes on to acknowledge  
15 the holding in *United States v. Richey*, 632 F.3d 559 (9<sup>th</sup> Cir. 2011), "that summonses issued  
16 during an audit may be enforced even after the case progresses beyond the audit stage." *Id.*

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19 Microsoft argues that Quinn Emanuel was "hired as trial counsel to prepare for Tax  
20 Court." Dkt. #93 at 28. As evidence for this argument, Microsoft cites Quinn Emanuel's  
21 webpage, *see id.* at 28 ("The firm's website and marketing materials tout their expertise as 'trial  
22 lawyers'"), *id.* at 33 ("[Quinn Emanuel] focused on 'winning' in a 'zero sum' game... *See...*  
23 Quinn Emanuel 'About Us' webpage"). The Court finds this evidence entirely speculative and  
24 unhelpful for determining the specific scope of work of Quinn Emanuel contractors. Microsoft  
25 next points to the number of "phases" of Quinn Emanuel's contract with the IRS and that the  
26 contract "commits the firm's lawyers to resolving conflicts that would prevent their  
27  
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1 appointment as ‘special government employees,’ as would be necessary to represent the IRS in  
2 Tax Court.” *Id.* at 28-29. On Reply, Microsoft sums up their position on this topic thusly: “[i]n  
3 an audit this complex, the IRS can always point to some document or interview it does not  
4 have. But, in light of the history of this audit, the IRS’s own documents, and the timing of  
5 hiring QE, the best explanation for these summonses is that they exist solely to facilitate QE’s  
6 preparation ‘in anticipation of litigation.’” Dkt. #100 at 17.

8 In its Response, the IRS argues that Microsoft offers only “coincidence and  
9 speculation” and that all of this is directly contradicted by Mr. Hoory’s testimony. Dkt. #97 at  
10 19-20. The IRS points to the testimony of Mr. Hoory that the Quinn Emanuel contract was, in  
11 fact, for one phase, and that any language mentioning multiple phases was *pro forma* language  
12 leftover as a drafting error. *See* Dkt. #94-29 at 137-140 (“Let me be very clear. There was only  
13 one phase awarded.”). The IRS points to Mr. Hoory’s testimony that the “special government  
14 employee” language in the contract was only included to preserve the availability of Quinn  
15 Emanuel attorneys, *if* the matter later ended up in Tax Court. *Id.* at 140-142 (“...we might get  
16 to tax court; and if we did, we might want Quinn Emanuel to assist. If that did happen, it would  
17 have to be subject to a new contract.”).

20 The Court agrees with the IRS—Microsoft relies solely on speculation and *post hoc*  
21 arguments. This can be seen clearly in the first two sentences of its briefing: “After auditing  
22 Microsoft for over seven years, the IRS retained Quinn Emanuel, a private law firm  
23 specializing in trying commercial cases. Only then did the IRS issue summonses seeking  
24 documents and testimony.” Dkt. #93 at 8.<sup>5</sup> The record does not contain any direct evidence  
25 that these summonses were issued to circumvent the discovery procedures of tax court. Nor is  
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28 <sup>5</sup> Microsoft’s briefing begins with a Table of Contents and Table of Authorities, which, together with the caption, occupy the first seven pages of its brief. *See* Dkt. #93.

1 there any direct evidence that they were issued by, because of, or at the behest of Quinn  
2 Emanuel. It is inaccurate, under any interpretation of the facts, for Microsoft to argue that  
3 these summonses were issued solely to facilitate Quinn Emanuel's preparation for litigation—  
4 as if Quinn Emanuel were running the audit. While there is significant evidence that Quinn  
5 Emanuel was hired for its expertise in litigation, there is still uncontroverted testimony that  
6 these summonses were issued to help the IRS "get to the right number." The Court's role in  
7 this matter is not to pass judgment on the IRS' contracting practices, but to enforce or not  
8 enforce the summonses.  
9

10 For further authority to issue these summonses while simultaneously contemplating  
11 litigation, the IRS cites to *PAA Mgmt., Ltd. v. United States*, 962 F.2d 212, 219 (2<sup>nd</sup> Cir. 1992),  
12 where the Second Circuit stated "we cannot agree with the suggestion that the prospect of an  
13 eventual court challenge by a taxpayer or similar entity to an IRS determination, and the  
14 likelihood that otherwise legitimate and relevant information sought by the IRS might  
15 eventually be discovered in that proceeding, deprives the IRS of its authority to summons the  
16 information at an earlier point in time in the process." The IRS also cites to *Sterling Trading,*  
17 *LLC v. United States*, 553 F. Supp. 2d 1152, 1159-1160 (C.D. Cal. 2008), where that district  
18 court concluded that the taxpayer failed to carry its "heavy burden" on a similar claim that the  
19 IRS was using summonses as a "pre-litigation discovery tool." The Court finds these cases  
20 instructive.  
21

22 Weighing the testimony of Mr. Hoory against the speculations of Microsoft, and  
23 acknowledging that Microsoft has the "heavy" burden of proof in this matter, *see United States*  
24 *v. Jose*, 131 F.3d 1325, 1328 (9th Cir. 1997), the Court finds that Microsoft has entirely failed  
25 to meet its burden of proof necessary to prevent the enforcement of these summonses.  
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1 Finally, it is worth noting that because the Court finds that the IRS had at least one  
2 legitimate purpose for these summonses—to get to “the right number” for the audit, even *if*  
3 Microsoft had convinced the Court that these summonses were *also* issued in bad faith, e.g. by  
4 deceptively obtaining a statute of limitations extension, or issued for an *additional* improper  
5 purpose, e.g. at the nefarious behest of Quinn Emanuel, such “co-existence of an improper  
6 purpose would not prevent enforcement of the summons if the existence of a legitimate purpose  
7 was not rebutted by the taxpayer.” *Stuckey*, 646 F.2d at 1375.

#### 9 IV. CONCLUSION

10 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,  
11 and the remainder of the record, the Court hereby FINDS and ORDERS that the United States  
12 of America’s Petitions to Enforce Internal Revenue Service Summons (Case No. 15-102, Dkt. #  
13 1; Case No. 15-103, Dkt. # 1), are GRANTED.

14 DATED this 20 day of November 2015.



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20 RICARDO S. MARTINEZ  
21 UNITED STATES DISTRICT JUDGE  
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